Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term 1996

DONALD A. ANCHORS
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. Whether the appellate court is permitted to apply a guilt based harmless error analysis and affirm a conviction based solely on circumstantial evidence of a defendant's guilt?

2. Whether, in a harmless error analysis, an appellate court can exceed the scope of normal appellate review and disregard of the trial judge's statements regarding the influence that certain testimony had upon the jury?

LIST OF ALL PARTIES

The Petitioner is Donald A. Anchors, a defendant below.

Additional defendants who are not participating in this appeal include John J. Voigt and Ralph A. Anderskow.

The respondent is the United States of America, plaintiff below.

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Petitioner respectfully requests that a Writ of Certiorari issue to review the judgment entered by the Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is unreported and is reproduced *infra* at Appendix A. The Order denying appellants' Petition for Rehearing dated August 13, 1996 is reproduced *infra* at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was initially entered on July 9, 1996. The Court of Appeals denied the Petitioners' timely petition for rehearing on August 13, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This action arises out of the Government's indictment and proceedings against the petitioner, Donald A. Anchors, along with his co-defendants for their participation in a multi-member conspiracy to defraud various borrowers and investors. Over counsel's objection, the District Court permitted a co-conspirator, Skip Alevy, to testify as a government witness, with respect to Mr. Anchors' mens rea in the participation in a criminal conspiracy. Mr. Anchors appealed his judgment of conviction and sentence on the basis that this lay opinion testimony violated the strictures of Rule 701 of the Federal Rules of Evidence which limits opinion testimony. Upon consideration of Anchor's Motion to Strike, the Trial Judge upheld its earlier ruling and stated that Alevy's testimony had been "very helpful to the jury." App. C at A-38. Upon review of the District Court's decision, the United States Court of Appeals for the Third Circuit concluded that although Alevy's opinion testimony was erroneously admitted because it failed to meet the requirements of Rule 701, the admission was harmless error because "the circumstantial evidence of Alevy's knowledge was overwhelming" and "there is no possibility that Alevy's opinion testimony ... contributed to the verdict." App. A at A-13 (emphasis added). The Appellate Court ignored the implications of the Trial Court's finding as to helpfulness. It is submitted that what is "helpful" cannot be "harmless".

The Conspiracy

John Voigt masterminded a scheme to obtain fees from loan applicants and potential investors for non-existent loan and investments using the Euro-American Money Fund Trust (the "Trust"). In January, 1991, after Voigt and his Trust has been in operation for almost two years, Anchors was hired for the position of "loan oversight officer." Anchors had previously been employed as a real estate salesman in Pittsburgh, Pennsylvania. Nothing in his background prepared him for his association with the Trust.

Anchors was hired by telephone. He was told that loans were about to be funded and his job was to monitor the borrowers and determine that funds were used as intended. Anchors never solicited borrowers; collected fees from borrowers; or signed commitment letters. Anchor's confidence in the Trust was reinforced by the fact that each of the borrowers were represented by an attorney who reviewed and approved the loans Anchors was to oversee.

Anchors had only limited contact with members of the Trust. Specifically, Anchors spoke by telephone with the government's "critical" witness, Skip Alevy, Voigt's second-in-command, no more than six times between January and July of 1991. Each conversation lasted less than one minute and was merely Anchors' attempt to locate Voigt. Anchors never had any conversations with Alevy after July, 1991. Anchors' written contacts with Alevy after July, 1991 were solely through Ralph Anderskow, a Trust attorney. Anchors received messages from Alevy, relayed through Anderskow, discussing loans about to be funded and providing reasons and assurances for funding delays. Anchors and Alevy never met until commencement of the trial. He met Voigt and Anderskow for the first time personally in March, 1993.

Mr. Anchors testified at length as to his belief in the legitimacy of the Trust. In particular, the following evidence was presented in support of his belief: the Trust was riddled with lawyers and accountants; Trust monies were paid to

borrowers; articles appeared in the Pittsburgh Gazette regarding a borrower and project Voigt claimed to be funding; borrowers who preceded Anchors' association with the Trust provided assurances; the Trust appeared eager to investigate environmental impact statements made by borrowers; and Anchors was reassured by tax opinions of the Trust's tax lawyers. Even international moneymen/government witnesses far more sophisticated than Anchors testified at length as to how Voigt persuaded them beyond their better judgment to part with millions of dollars. Anchors' misperception of Voigt and the Trust continued until well after his indictment as evidenced by Anchors letter to the non-existent George Pebereau, supposed Executive Director of the Trust, just three days before his arrest regarding Anchors funding concerns with respect to the Trust. He received and his wife noted telephone calls received from the equally imaginary Remy Devoe.

The government had no evidence that Anchors was ever advised of the fraudulent nature of the scheme. The information Anchors received was provided on a "need to know" basis as evidenced by the fact that he was provided with correspondence with key passages whited out. Notably, Alevy sought to provide a list of knowledgeable participants in the scheme, Anchors' name was not included. Anchors kept meticulous records of the funds received and his expenses, which he voluntarily turned over to the FBI.

In its Superseding Indictment filed December 13, 1993, the government charged Anchors with one count of conspiracy to defraud various borrowers and investors through the operation of the Trust, fifteen counts of wire fraud, and two counts of money laundering.

Alevy's Lay Opinion Testimony

At trial, over counsel's objection, the District Court permitted Alevy to testify as a government witness with respect to Anchors' mens rea in the participation in a criminal conspiracy. In specific response to the government's request

for an opinion, Alevy testified that, in his opinion, Anchors must have known that the Trust was engaged in a large-scale fraud.

On June 23, 1994, the jury returned its verdict and found Anchors guilty of conspiracy and seven counts of wire fraud relating solely to acts involving the borrowers. Anchors was acquitted of the remaining wire fraud and all money laundering counts. On January 27, 1995, the District Court filed an Amended Judgment of Conviction affirming the jury verdict on all counts with the exception of one wire fraud count. Anchors was sentenced to thirty-two months of imprisonment to be served concurrently, on each of the counts on which he was found guilty.

The Decisions Below

During a multi-day Rule 29 hearing at the close of the government's case, Anchors moved to strike the lay opinion testimony of co-conspirator, Solis Alevy, due to its violation of the strictures of Rule 701 of the Federal Rules of Evidence.[1] After having an opportunity to weigh and evaluate the facts in the government's case, the court upheld its earlier ruling permitting this lay opinion testimony because, in its opinion, Alevy's testimony was "very helpful to the jury." App. C at

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[1] Rule 701 provides:

> If the witness is not testifying as an expert, the witnesses' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FED. R. EVID. 701.

A-38. The trial court based its decision on the government's argument, which was reiterated in its appellate brief, that Alevy's testimony was "critical" and "helpful to the jury." App. D at A-45.

Upon review of the District Court's decision, the United States Court of Appeals for the Third Circuit concluded that the District Court's decision to permit Alevy's lay opinion testimony was in error in that it failed to meet Rule 701(b)'s "helpfulness" requirement. App. A at A-12. However, even though the trial judge concluded that Alevy's testimony was "very helpful to the jury," the panel concluded that its erroneous admission was harmless because "there is no possibility that Alevy's opinion testimony... contributed to the verdict." *Id.* at A-13. (emphasis added).

REASONS TO GRANT A WRIT OF CERTIORARI

A. Summary

The broad language of the Harmless Error rule, 28 U.S.C. § 2111 (1995), which refers only to errors that do not affect "substantial rights" of the parties, offers little guidance to appellate judges confronted with the question of whether an error in any particular case requires reversal. As a result, appellate courts are free to apply a guilt based harmless error analysis which improperly focuses on whether the fact finder came to the appropriate verdict, rather than whether the trial court's error substantially influenced the jury. Such an approach inappropriately permits appellate courts to exceed the limited scope of appellate review by substituting its judgment for that of the trial court.

Here, the Third Circuit adopted such an approach. The Court of Appeals expressly acknowledged that the District Court erred in permitting improper lay opinion testimony and therefore, the appropriate standard of review was "harmless error." This required the court to make a determination as to

whether the error had a "substantial influence" on the decision of the jury. In examining the trial record, however, the panel lost sight of this rule. In complete contradiction to the trial judge's findings that the evidence as "very helpful to the jury," the panel concluded that "there is no possibility that Alevy's opinion testimony to the same effect contributed to the verdict."

The defendant's Sixth Amendment right to a jury trial dictates adoption of a harmless error analysis that best limits appellate-level intrusion on the trial court's judgements. It is beyond the scope of appellate review for a panel to substitute its judgment for that of the trial court as to whether an error had substantial influence on the jury. The degree of protection that one's constitutional rights receive is greatly reduced by an appellate court's use of the guilt based harmless error analysis which permits this expansive scope of review. If the Third Circuit's interpretation of the harmless error standard is permitted to stand, true appellate review will be meaningless in the Third Circuit.

Because the present harmless error standard offers limited guidance for appellate review and permits appellate courts to make guilt or innocence determinations, this situation is ripe for the Court to address.

B. Having Loosely Defined The Harmless Error Standard, The Third Circuit Then Applied A Guilt Based Analysis Directly Inconsistent With This Court's Rulings In Order To Preserve The Appellant's Conviction

In defining "harmless error", the United States Code provides that:

> [o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record

> without regard to errors or defects which do not affect the *substantial* rights of the parties.

28 U.S.C. § 2111 (1995) (emphasis added). The broad language of the rule, referring only to errors that do not affect "substantial rights," offers little guidance to appellate judges confronted with the question of whether an error in any particular case requires reversal. As a result, the Third Circuit applied a guilt based harmless error analysis which improperly focused on whether the fact finder came to the appropriate verdict, rather than whether the trial court's error substantially influenced the jury.

Since the burden rests on the government to establish the harmlessness of the error, the appellate court must reverse unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *United States v. Turcks*, 41 F.3d 893, 898 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1716 (1995) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). Only when the appellate court:

> is *sure that the error did not influence the jury, or had but very slight effect*, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.

Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) (emphasis added).

Justice Stevens further clarified the standard in his concurring opinion in *United States v. Hasting*, 461 U.S. 499, 516 (1983). He stated "[a] federal appellate court should not find harmless error merely because it believes that the other

evidence is "overwhelming." *Id.* (Stevens, J., concurring); *see also Kotteakos*, 328 U.S. at 764-65 (stating "[t]he inquiry cannot be merely whether there was enough to support the result...[i]t is rather, ... whether the error itself had substantial influence").

In direct contrast to this Court's rulings, the Third Circuit based their opinion solely on their belief that the circumstantial evidence of Anchors' knowledge was "overwhelming". App. A at A-13. In doing so, the court used the weight of the evidence against Anchors as the sole criterion in their harmless error analysis of the District Court's error, rather than as just one factor in that analysis. Thus, the Third Circuit applied a guilt based harmless error test in that they improperly examined the case with respect to whether the jury reached the correct verdict despite the error, rather than analyzing whether the verdict was substantially influenced by the error.

In Section IV.B of their opinion, the panel reanalyzed the circumstantial evidence citing case law which focused on circumstantial evidence in the context of a criminal conspiracy.[2] The panel cited *United States v. Rea*, 958 F.2d

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[2] While the analysis in Section IV.B of the Third Circuit's opinion appears to support the jury's judgment of conviction, in its rush to judgment the Appellate Court accepted the government's version of the trial which was narrated by an attorney who was not present. In fact, the Court's analysis of the circumstantial evidence neglected to recognize the weight of the evidence that Anchors was affirmatively misled. In giving statements to the government authorities, Alevy never named Anchors as a knowing participant. In fact, Alevy only spoke to Anchors no more than six times, and each conversation was less than one minute and consisted of Anchors asking about the whereabouts of Jon Voigt.

(continued...)

1206 (2d Cir. 1992), a Second Circuit opinion, in support of its conclusion that admission of lay witness testimony which fails to meet Federal Rule of Evidence 701's helpfulness requirement is harmless error. In *Rea*, the court found that in light of the properly admitted evidence, there was "no basis" for believing the jury was influenced by the improperly admitted lay opinion testimony. *Id.* at 1221. There is a critical distinction between Anchors' case and *Rea*. In *Rea*, there was nothing in the record which suggested or indicated that either the district court judge or the government agreed that the lay opinion testimony at issue was either critical and/or very helpful to the jury.

The Third Circuit reasoned that since the government did not rely on Alevy's testimony in its summation, and instead relied on the "mountain" of circumstantial evidence to support the inference that Anchors' "must have known," there was "no possibility" that the error contributed to the verdict. App. A at A-13.

The appropriate harmless error standard required that the Third Circuit not base their opinion solely upon circumstantial evidence but instead, the standard compelled the panel to determine whether the trial court's error of admitting Alevy's lay opinion testimony substantially influenced the jury. However, in their rush to affirm Anchors' conviction, the court completely ignored the trial court's opinion which plainly

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(...continued)

In a footnote, the panel discussed the testimony of Mercedes Travis. App. A at A-12, n.5. Travis testified that Anchors was kept out of the distribution of funds from the Trust. When Travis decided who among the co-conspirators was to be paid during the summer of 1992, Anchors was not on the list. Travis' testimony constituted objective evidence that Anchors lacked knowledge of the fraud in the best way possible, which is easily distinguished from Alevy's subjective view that Anchors "must have known" of the fraud.

emphasized the importance of Alevy's testimony as to Anchors subjective knowledge. In total disregard for the trial judge's ability to determine the importance of the testimony to the jury as he witnessed the trial unfold, the panel impermissibly substituted its judgment for that of the trial judge.

C. The Third Circuit Ignored The Trial Record Wherein The Trial Court Specifically Found And The Government Agreed That The Evidence Was "Critical" And "Very Helpful" To The Jury

District Judge Brown heard the government's case and had the best vantage to weigh and analyze its evidence. He observed the demeanor of witnesses and assessed their credibility.

At trial Judge Brown admitted Alevy's opinion testimony over counsel's objection. Subsequently, at the close of the government's case, the district court conducted a multi-day Rule 29 hearing. In reviewing Anchors' motion to strike Alevy's lay opinion testimony, Judge Brown upheld his earlier ruling, made in the heat of trial, and admitted the opinion evidence at issue. Judge Brown gave reasons for his finding. He could have said the evidence was inconsequential, or allowed evidence without comment, but instead he stated that Alevy's testimony was:

> "**very helpful to the jury** because it is a statement from the claimed deceiver himself as to what his perceptions were of his deceit, its objects and its effect."

App. C at A-38 (emphasis added). Judge Brown further ruled post-trial that:

> not to permit Alevy to voice his opinion would have unfairly constrained the prosecution's presentation of its theory of the case, which was that a hallmark of the Trust conspiracy was

> dissemination of self-serving rhetoric designed to insulate its participants from detection.

App. D at A-45 (emphasis added).

Furthermore, the government underscored the importance of Alevy's testimony by emphasizing the critical nature of his testimony in its brief. The government argued that:

> Alevy's testimony was helpful to the jury in its evaluation of Anchors' mental state, the critical disputed issue in this case against Anchors.

Id. (emphasis added).

The significance of the trial judge's finding with regard to the importance of Alevy's testimony cannot be understated. Whether Anchors had knowledge of the fraud and conspiracy is the "critical disputed issue" in this case. The fact that Judge Brown found the testimony to be "very helpful to the jury" in determining Mr. Anchors' mental state after he had heard all of the evidence demonstrates that the admission of the opinion evidence cannot be deemed harmless.

1. Evidence Which The Trial Judge Found To Be "Very Helpful To The Jury" And Which The Government Characterized As "Critical" Cannot, By Definition, Be "Harmless"

"To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question as revealed in the record." *Turks* 41 F.3d at 898 (citing *Yates v. Evatt*, 111 S. Ct. 1884, 1893 (1991)) (emphasis added).

Both the government and trial judge determined that the same evidence was "critical" and "very helpful to the jury." By definition, helpful and important evidence cannot be "harmless" evidence. Therefore, it is impossible for the

admission of Alevy's lay opinion testimony to be unimportant and therefore, harmless error.

It was logically, factually, and legally wrong for the panel to suggest that there was "no possibility" that this evidence influenced the "critical disputed issue" when, at the close of the government's case, Judge Brown specifically found that Alevy's lay opinion testimony was "very helpful to the jury." The factual record simply does not establish "beyond a reasonable doubt" that the evidence at issue did not contribute to the jury's verdict. It would have been too easy for both Judge Brown and the government to find the opinion testimony to be insignificant. Simply because the government chose not to compound the trial court's two earlier errors - admitting Alevy's testimony at trial and subsequently at the Rule 29 hearing - by not referring to Alevy's testimony in its summation, does not mean that the admission of such testimony was not prejudicial to Anchors.

The panel completely ignored the appropriate inquiry: whether the verdict was substantially influenced by the District Court's decision to permit the introduction of Alevy's lay opinion testimony? Had the panel made the appropriate inquiry, they would have realized that even if the jury accepted some or all of the circumstantial evidence against Anchors as true, the jury could have also relied on Alevy's testimony in reaching its verdict and therefore, both the circumstantial evidence and Alevy's testimony could have contributed to the jury's verdict. Thus, by focusing its attention on the "correctness" of the jury's judgment despite the error, rather than analyzing whether the verdict was substantially influenced by the error, the panel improperly applied a guilt based harmless error analysis to the facts of this case.

D. The Guilt Based Approach Used By The Third Circuit Is Inconsistent With The Constitutional Framework Of Our Judicial System In That It Permitted The Appellate Court To Substitute Its Judgment For That Of The Trial Court And Jury

This Court's many admonitions in *Kotteakos* and other early cases make clear that the question involved in harmless error analysis is not whether the jury reached the correct verdict despite the error, but whether the verdict was "substantially influenced" by the error. *Kotteakos*, 328 U.S. at 764-65. For example, in *Kotteakos v. United States*, 328 U.S. 750 (1946), this Court stated: "[t]he question is, not were [jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision." *Id.* at 764.

This rule rests on a sound premise. The Constitution grants criminal defendants the right to have juries, not appellate courts, render judgments of guilt or innocence. *See* U.S. CONST. art. III, 2, cl. 3 (stating "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury...."); *id.* amend. VI (stating "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..."). As Justice Frankfurter noted:

> [i]n view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. United States, 326 U.S. 607, 615 (1946).

As such, the appellate court is not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because they believe the defendant is guilty. *Weiler v. United States*, 323 U.S. 606, 611 (1945). Such acts would require an appellate court to substitute their "judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility." *Id.*; *see also Kotteakos*, 328 U.S. at 763-64 (stating "[i]t is not the appellate court's function to determine guilt or innocence.... Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error"). As Justice Traynor aptly observed:

> [a]ll too often an appellate court confuses review by applying the substantial evidence test to determine whether an error is harmless. Such a court considers only the evidence in support of the judgment and ignores erroneous matter. It assumes that the trier of fact, having decided against the appellant, believed all properly admitted evidence against him and disbelieved all evidence in his favor. No wonder that under such a review most errors are found harmless.

ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 28 (1970). This problem was also recognized by Justice Marshall in his dissent in *Schneble v. Florida*, 405 U.S. 427 (1972), where the majority found a violation of the Bruton doctrine to be harmless error based on overwhelming evidence of the petitioner's guilt. *Id.* at 428. Marshall stated that "the mistake the Court makes is in assuming that the jury accepted as true all of the other evidence." *Id.* at 436 (Marshall, J., dissenting).

The very nature of the appellate function leaves judges of the courts of appeals poorly equipped to make such guilt determinations. An appellate judge's view of the trial is limited to the record, and many events of trial pass without

recognition in the printed transcript. For example, the appellate court does not have the opportunity to watch the demeanor of witnesses, listen to the intonations of their voices, or engage in any of the countless other observations that inhere in an assessment of credibility such as such as age, sex, intelligence, experience, occupation, demeanor, or temperament of the witness which may affect the probative value of testimony. Unlike an appellate court, the trial court and jury are in a position to take note of such factors.

It is a well settled principle of law that the trial court, and not the Court of Appeals, is in the best position to consider the complicated evidentiary issues involved in a given case. *United States v. Retos*, 25 F.3d 1220, 1228 (3d Cir. 1994). As such, the appellate court is not permitted to substitute its judgment for that of the trial judge. *E.g. United States v. Taylor*, 487 U.S. 326, 336 (1988); *Morales v. City of San Rafael et al.*, 1996 U.S. App. LEXIS 23346, at *23 (9th Cir. May 6, 1996) (Kleinfeld, J., dissenting); *United States v. Torres*, 53 F.3d 1129, 1144 (10th Cir. 1995); *United States v. Nobles*, 69 F.3d 172, 180 (7th Cir. 1995); *Reich v. Lancaster et al.*, 55 F.3d 1034, 1051 (5th Cir. 1995).

In his dissent to a recent Third Circuit opinion, Justice Aldisert identified several reasons why district court judges are much more capable than appellate court judges in exercising broad discretion. *Washington v. Philadelphia County Court of Common Pleas*, 1996 U.S. App. LEXIS 16286 (3d Cir. 1996). He further articulated the importance of respecting the district court's discretionary power.

> They [district judges] are on the scene. They smell the smoke of battle. Indeed, Professor Maurice Rosenberg has identified four reasons that support vesting discretion in trial courts. ... One is the plain urge to economize on judicial energies. ... A second reason is maintaining morale. ... The third reason is ... finality. ... The most pointed and helpful reason is the

> superiority of his position. It is not that he knows more than his loftier [brothers and sisters]; rather [the trial judge] sees more and senses more. In the dialogue between the appellate judges and the trial judge, the former often seem to be saying: "You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial. Therefore, we defer to you."

Washington, 1996 U.S. App. LEXIS 16286, at *54-55 (Aldisert, J., dissenting).

The Third Circuit's adoption of a guilt based harmless error analysis permitted the panel to exceed the scope of appellate review by inappropriately substituting its judgment for that of the trial court. The panel is ill-equipped to make such guilt based determinations.

CONCLUSION

The Third Circuit's adoption of a guilt based harmless error analysis impermissibly allowed it to focus on whether the fact finder came to the appropriate verdict, rather than whether the trial court's error substantially influenced the jury. In doing so, the court exceeded the normally limited scope of appellate review and, instead, substituted its judgment for that of the trial court. The adoption of such an approach ensures that an appellate court will never find an error to be anything more than harmless.

Each time the appellate court rules that an error is harmless, it has the potential of eroding an important legal principle because the rights of individuals, both constitutional and otherwise, go unenforced. Moreover, the deterrent force of a reversal remains unfelt by those who caused the error.

If the Third Circuit's interpretation of the harmless error standard is permitted to stand, it will improperly deny appellate review -- the only effective remedy -- to appellant-defendants who have a bona fide claim of trial court error with prejudicial effects. If real errors by the trial court are not appropriately reviewed by an appellate court, then true appellate review is meaningless in the Third Circuit.

For the above reasons, Petitioners respectfully request that the Court grant a Writ of Certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5093

UNITED STATES OF AMERICA

v.

RALPH A. ANDERSKOW,

Appellant

No. 95-5094

UNITED STATES OF AMERICA

v.

DONALD ANCHORS,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Nos. 93-cr-00300-02 & 93-cr-00300-03)

Present: Cowen and Sarokin, *Circuit Judges,* Pollak,
*District Judge**

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the District of New Jersey and were argued by counsel January 25, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District

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* Hon. Louis H. Pollak, U. S. District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

Court entered January 25, 1995, be, and the same are hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sisk

Clerk

Dated: July 9, 1996

Filed July 9, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5093

UNITED STATES OF AMERICA

v.

RALPH A. ANDERSKOW,
Appellant

No. 95-5094

UNITED STATES OF AMERICA

v.

DONALD ANCHORS,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal Nos. 93-cr-00300-02 & 93-cr-00300-03)

Argued January 25, 1996

Before: COWEN and SAROKIN, *Circuit Judges*, and
POLLAK, *District Judge**

(Filed July 9, 1996)

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*Honorable Louis H. Pollak, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

COWEN, *Circuit Judge.*

Ralph Anderskow and Donald Anchors appeal from judgments of conviction and sentence entered by the District Court for the District of New Jersey. The convictions arise out of their participation, along with several other coconspirators, in the Euro-American Money Fund Trust (the "Trust"), an entity that was used to perpetrate a pernicious advance-fee scheme. Over a three-year period, the Trust bilked unsuspecting loan applicants

and investors out of over eighteen million dollars. Both defendants raise evidentiary and legal sufficiency challenges. We will affirm the judgments of conviction.

I.

John Voigt was the mastermind of a scheme to obtain fees from loan applicants and potential investors for nonexistent loans and investments. At the heart of this scheme was the Trust. Voigt fabricated a fictitious genealogy for the Trust, claiming that it was a long-established European financial institution affiliated with the Catholic Church and the Knights of Malta, and that it had access to billions of dollars. For two and one-half years brokers for the Trust would recount this false genealogy to unsuspecting loan applicants and investors, who would part with substantial fees in return for "self-liquidating" loans (loans that repaid themselves) and "Master Collateral Commitments" ("MCCs"), allegedly a special form of commercial paper available only to banks.

Voigt benefitted from the cooperation of several coconspirators, including Anderskow, a partner at a Chicago law firm who also was a certified public accountant. He was hired as the Trust's lawyer in the Chicago area, and his credentials helped provide the Trust with an appearance of legitimacy, which facilitated its attempts to lure loan applicants and potential investors. Anderskow's primary responsibility was providing guarantees to borrowers on behalf of the Trust and maintaining a client escrow account into which advance fees were deposited. Anderskow would immediately distribute fees that had been deposited into his escrow account according to Voigt's instructions, which violated the terms of contracts entered into with the loan applicants and investors. For his role in the Trust Anderskow received $995,000 in compensation.

In January of 1991 appellant Anchors was hired for the position of "loan oversight officer." Somewhat akin to a customer relations manager, Anchors was primarily responsible for responding to questions and complaints from customers of the Trust. Over time, Anchors devoted

much of his time to placating loan applicants who had paid advance fees and were calling with increasing frequency to inquire as to the status of their loans. Anchors eventually responded to several hundred calls each month, assuring disgruntled borrowers that their loans were about to be funded. Eventually, Anchors began to tell some applicants that other loans had been funded, which he knew was untrue. Anchors received $325,000 for his participation in the Trust.

In June of 1993, a federal grand jury issued a twenty-six-count indictment against Anderskow, Anchors, and their three coconspirators—Voigt, Mercedes Travis, and Solis Alevy. Alevy entered a plea of guilty and became a government witness. Subsequently, the grand jury issued a twenty-eight-count superseding indictment against the remaining four defendants, charging Anderskow and Anchors with conspiracy to commit wire fraud, wire fraud, and money laundering, and bringing criminal money laundering forfeiture allegations against them.

After a three-month trial, a jury convicted Anderskow on all charges except two counts of wire fraud. Anchors was convicted of conspiracy and seven counts of wire fraud, but was acquitted of seven other counts of wire fraud and two counts of money laundering.[1] Anderskow and Anchors were sentenced, respectively, to terms of imprisonment of seventy-eight and thirty-two months. This appeal followed.[2]

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1. The district court granted Anderskow's and Anchors' motions for judgment of acquittal on one count of wire fraud since it arose out of the conduct of acquitted codefendant Travis and could be sustained only under the coconspirator liability theory of *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180 (1946).

2. Alevy pled guilty prior to trial and testified for the government. Travis, who went to trial along with Anderskow, Anchors and Voigt, was acquitted. Voigt was convicted on all but two counts of wire fraud. We affirm his judgment of conviction in a separate opinion filed this day. *United States v. Voigt*, ___ F.3d ___, No. 95-5092 (3d Cir. 1996). Familiarity with that opinion is assumed.

II.

The district court had original jurisdiction over these criminal actions pursuant to 18 U.S.C. § 3231. We exercise appellate jurisdiction to review final judgments of conviction under 28 U.S.C. § 1291.

III.

Both Anderskow and Anchors contest the district court's decision to allow coconspirator Alevy, who pled guilty prior to trial and testified for the government, to give lay opinion testimony under Rule 701 of the Federal Rules of Evidence.[3] Alevy's testimony tended to show that Anderskow and Anchors had knowledge of the Trust's fraudulent scheme. Contending that Alevy's allegedly improper testimony provided the government with its only evidence concerning their knowledge that the Trust was a fraud, both defendants claim that this alleged error was so prejudicial as to warrant a new trial. We disagree.

A. *Anderskow*

1.

During its case in chief, the government called Alevy to testify about the workings of the Trust and its various components. Specifically, Alevy was asked to explain why in late 1991 he had drafted letters containing false information for Anderskow to sign and send to a victim of the Trust who had paid a substantial advance fee for an MCC, and was becoming angry at not having received it. Anderskow assigns error to the following exchanges between the government and Alevy:

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3. If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

FED R. EVID. 701.

Q. How is it that you, on the one hand, passed false information to Mr. Anderskow but did not intend to deceive him?

A. Mr. Anderskow was a daily participant in the same fraud that I was. I can't get into his mind, I have no way of knowing what he knew inside his mind, but it was obvious to me and told to me by Mr. Voigt that [Anderskow] will do anything we ask him to.

. . .

Q. When you passed on that false information to Mr. Anderskow, did you do it to deceive him?

A. No, sir.

Q. Why then did you pass on information if it wasn't true?

A. It was part of the job I was doing, and he was doing the part of the job that he was doing, and some information was necessary for his part.

. . .

Q. Did you ever directly or specifically discuss this fraud with Mr. Anderskow?

A. No, sir.

Q. Why not?

A. There was no reason to. We were both doing the same thing for the same ends every day.

App. at 1786, 1799.[4]

2.

Anderskow's complaint is twofold. First, he claims that Alevy lacked sufficient personal knowledge to form an

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4. Anderskow and Anchors submitted separate appendices with their respective briefs. The record citations we provide refer to the appendix of the particular appellant whose legal claims we are addressing.

opinion as to whether Anderskow knew the Trust was a fraud and, therefore, that Alevy's testimony failed to meet Rule 701(a)'s "rational basis" requirement as a matter of law. Second, Anderskow appears to argue that even if Alevy's opinion was rationally based on his perceptions, to the extent it suggested that Anderskow had guilty knowledge it was tantamount to an opinion on the ultimate issue of Anderskow's guilt. Alevy's opinion testimony, according to Anderskow, failed to meet Rule 701(b)'s "helpfulness" requirement as a matter of law.

We normally review alleged evidentiary errors for abuse of discretion. *Government of Virgin Islands v. Knight*, 989 F.2d 619, 629 (3d Cir.), *cert. denied*, 114 S. Ct. 556 (1993); *Eisenberg v. Gagnon*, 766 F.2d 770, 780 (3d Cir.), *cert. denied*, 474 U.S. 946, 106 S. Ct. 346 (1985). Anderskow, however, failed to object contemporaneously to any of the testimony about which he now complains. As a result, we review his contention for " 'plain error,' that is, 'egregious error or a manifest miscarriage of justice.' " *United States v. Price*, 76 F.3d 526, 530 (3d Cir. 1996) (quoting *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928, 109 S. Ct. 314 (1988)). *See* FED. R. CRIM. P. 52(b).

We find no plain error because none of the disputed testimony actually contains a "lay opinion" by Alevy as to Anderskow's knowledge. Although it is readily apparent that in questioning why Anderskow would know that the information in the letters was false the government was *attempting* to elicit an opinion from Alevy, he never explicitly opined on direct examination that Anderskow possessed guilty knowledge. Instead, Alevy provided several reasons to support the unstated conclusion that Anderskow had guilty knowledge. For instance, Alevy testified that he did not believe that Anderskow would be deceived since Anderskow and Alevy were part of the same organization working toward a common goal, and because Voigt had told him that Anderskow would do anything they asked. This simply furnished the basis for an inference, based on circumstantial evidence, that Anderskow had guilty knowledge which the government was free to suggest during its closing argument and which the jury was free to

accept or reject. Accordingly, since Alevy's testimony did not implicate Rule 701, there clearly was no plain error in its admission.

B. *Anchors*

Anchors advances a similar claim with respect to Alevy's testimony. Because Anchors preserved this claim for appellate review by raising a contemporaneous objection, we review the admission of Alevy's opinion testimony under Rule 701 for abuse of discretion. *Knight*, 989 F.2d at 629; *Eisenberg*, 766 F.2d at 780.

1.

During its case in chief, the government questioned Alevy about certain documents he had sent to Anchors to be passed along to borrowers who had paid advance fees and were becoming angry at not having seen any results. Anchors assigns error to the following exchanges between the government and Alevy:

> Q. Now, when you were providing this information concerning schedules and projects to Mr. Anchors, did you intend to deceive him by that information?
>
> A. No, sir.
>
> Q. How so?
>
> A. I was doing my job, he was doing his job.
>
> Q. Did you believe that Donald Anchors would be deceived by the information that you were sending him?
>
> . . .
>
> A. Personally, I did not believe that.
>
> Q. Why not?
>
> A. Donald Anchors had probably 20 or 30 borrowers, maybe more for all I know, who had been promised millions of dollars for a long time, some as long as a year. He had never seen one dime funded or loaned, and he kept on with the business at hand.

I had no reason to believe that he wasn't fully aware of what was occurring, as long as he was getting paid.

Q. Did you ever specifically discuss fraud, the fraud in which you believed you were involved with Donald Anchors?

A. No, sir.

Q. Why not?

A. There was no reason to discuss this, we were doing it.

App. at 503-04.

2.

Anchors first complains that he had insufficient contact with Alevy for his opinion to be "rationally based" on his perceptions. We disagree. We have held that lay opinion testimony can be based upon a witness' "knowledge and participation in the day-to-day affairs of his business," *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1175 (3d Cir. 1993), and upon a witness' review of written documents. *United States v. Leo*, 941 F.2d 181, 193 (3d Cir. 1991); *Teen-Ed, Inc. v. Kimball Int'l, Inc.*, 620 F.2d 399, 403-04 (3d Cir. 1980). Alevy's testimony revealed that he had contact with Anchors by telephone and via facsimile on a weekly basis in the fall of 1991. Most of this correspondence concerned loan schedules that had been promised to borrowers. In explaining the workings of the Trust and the roles of its various members, Alevy testified that he would provide schedules containing false information to Anchors so that he could pass them along to the borrowers. We think that in light of the weekly correspondence by telephone and facsimile between Alevy and Anchors, Alevy had sufficient first-hand knowledge such that his opinion was "rationally based" on his perceptions. *Lightning Lube, Inc.*, 4 F.3d at 1175; *Leo*, 941 F.2d at 193; *Teen-Ed, Inc.*, 620 F.2d at 403-04.

Although we conclude that Alevy's testimony was "rationally based" on his perception of Anchors, we

conclude that Alevy's subjective belief that Anchors "must have known" fails to meet Rule 701(b)'s "helpfulness" requirement.[5] Anchors' principal contention is that the reasons supporting Alevy's opinion as to why Anchors would not be deceived were already before the jury. Since it was for the jury to determine whether he "must have known" that the Trust was engaged in a large-scale fraud, Alevy's opinion on the subject, according to Anchors, essentially turned him into a thirteenth juror. We agree.

In *United States v. Rea*, 958 F.2d 1206 (2d Cir. 1992), the Court of Appeals for the Second Circuit held that where the jury has before it the same circumstantial evidence of a defendant's criminal knowledge on which a witness bases an opinion concerning a defendant's knowledge, testimony from a witness concluding that the defendant "had to know" usually will not meet Rule 701(b)'s helpfulness requirement:

> [W]hen a witness has fully described what a defendant was in a position to observe, what the defendant was told, and what the defendant said or did, the witness's opinion as to the defendant's knowledge will often not be "helpful" within the meaning of Rule 701 because the jury will be in as good a position as the witness to draw the inference as to whether or not the defendant knew.

Id. at 1216 (internal citations omitted). The *Rea* court found that testimony by a witness that the defendant "had to know" failed to meet Rule 701's helpfulness requirement, but went on to conclude that the error was harmless.

In this case, Alevy testified about the number of complaints Anchors was receiving from customers; Anchors' response to those complaints; and the sheer passage of

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5. When Anchors cross-examined codefendant Travis, who testified in her own behalf and ultimately was acquitted, Anchors essentially elicited an opinion that, in Travis' subjective view, he had no knowledge of the Trust's fraudulent activities. We find it interesting that Anchors uses Travis' opinion to support his legal sufficiency claims. Curiously, Anchors provides no explanation as to why Travis' opinion testimony concerning his lack of guilty knowledge poses less Rule 701 difficulty than Alevy's testimony precisely to the contrary.

time during which Anchors saw no loans funded. That Alevy "had no reason to believe that [Anchors] wasn't fully aware of what was occurring, as long as he was getting paid," App. at 504, simply was not helpful to the jury's determination of Anchors' criminal knowledge. The government suggests that because a coconspirator's subjective belief that a defendant "must have known" simply provides additional circumstantial evidence[6] as to the defendant's objective mental state, it is helpful to the jury. We are not persuaded. We do not understand how a witness' subjective belief that a defendant "must have known" is helpful to a factfinder that has before it the very circumstantial evidence upon which the subjective opinion is based. Furthermore, during its closing argument the government is free to ask the jury to draw the inference suggested by the circumstantial evidence: that the defendant must have known. Accordingly, our holding does nothing to hamper the government's ability to establish a defendant's criminal knowledge, even where members of a conspiracy never openly discuss their criminal activity.

Although we conclude that Alevy's opinion testimony fails to meet Rule 701(b)'s helpfulness requirement, its admission was harmless error. As our opinion will demonstrate, *see infra* IV.B., the circumstantial evidence of Anchors' knowledge was overwhelming. Furthermore, the government did not rely on Alevy's testimony in its summation, stressing instead the mountain of circumstantial evidence supporting the inference that Anchors "must have known." Accordingly, there is no possibility that Alevy's opinion testimony to the same effect contributed to the verdict.

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6. The evidence is circumstantial because the jury would be asked to infer from Alevy's subjective belief that Anchors had criminal knowledge that, objectively speaking, Anchors in fact had criminal knowledge. The strength of the inference, the government argues, logically depended on the basis for Alevy's subjective belief and his motive for testifying, issues that were addressed exhaustively on cross-examination.

IV.

At trial the government had no direct proof of a tacit agreement among Voigt, Alevy, Anderskow and Anchors to engage in an advance-fee scheme. Accordingly, both defendants filed posttrial motions for judgments of acquittal contending that the government had failed to adduce sufficient evidence that they were knowing participants in a scheme to defraud potential borrowers and/or investors. They appealed the district court's denial of those motions.

Our review of the sufficiency of the evidence is "governed by strict principles of deference to a jury's findings," *United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir.), *cert. denied*, 469 U.S. 858, 105 S. Ct. 189 (1984), such that we draw all reasonable inferences in favor of the jury verdict. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct 2781, 2789 (1979). We will overturn a verdict only "if no reasonable juror could accept evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt." *United States v. Coleman*, 811 F.2d 804, 807 (3d Cir. 1987) (quoting *United States v. Campbell*, 702 F.2d 262, 264 (D.C. Cir. 1983)). Consequently, a "claim of insufficiency places a very heavy burden on an appellant." *United States v. Gonzalez*, 918 F.2d 1129, 1132 (3d Cir. 1990) (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir.), *cert. denied*, 457 U.S. 1125, 102 S. Ct. 2945 (1982)), *cert. denied*, 499 U.S. 982, 111 S. Ct. 1637 (1991).

A. *Anderskow*

Anderskow was convicted on ten counts of money laundering arising out of various transfers of funds from his attorney escrow account to Trust members, pursuant to Voigt's instructions, between July and October of 1991. He also was convicted on numerous counts of wire fraud relating to his actions during the same period. Anderskow claims that the evidence is legally insufficient to sustain those convictions because the government failed to prove that he knew the funds being transferred represented the proceeds of unlawful activity, 18 U.S.C. § 1956(a)(1), or that the transfers were intended to promote "the carrying on of specified unlawful activity." *Id.* § 1956(a)(1)(A)(i). He likewise contends that the evidence is insufficient to demonstrate

that he was a knowing and willful participant in a scheme to defraud. *Id.* § 1343. Simply stated, Anderskow argues that the government failed to prove that he was a member of the conspiracy. We disagree.

The crucial period with respect to Anderskow's legal sufficiency challenges is July of 1991, the start of his money laundering activity. Anderskow's position on appeal is that he joined the Trust believing it to be a *bona fide* provider of funding services and that Voigt was a "legitimate, honest international financier." Anderskow's Br. at 32. He also points to Alevy's testimony that they never openly discussed the fraudulent nature of the Trust and the "steady stream of false and deceptive information" Alevy provided him to be passed on to the Trust's customers. *Id.* at 34. Anderskow argues that absent Alevy's improper opinion testimony as to his knowledge, the government produced insufficient evidence that he was a knowing and willful participant in an illegal venture between July and September of 1991.

In rejecting Anderskow's argument, we begin our analysis by observing that at trial Anderskow asserted a good-faith defense to the fraud charges. The government, therefore, sought and obtained from the district court a "willful blindness" instruction. The district court charged the jury that "[t]he element of knowledge may be satisfied by inferences drawn from proof that a defendant may have deliberately closed his or her eyes to what otherwise had been obvious to him or her." App. at 4287-88. We think that even if Anderskow were correct that the government failed to establish that he was aware of the Trust's fraudulent nature when he first joined in March of 1990, viewed in the light most favorable to the government, *Jackson v. Virginia*, 443 U.S. at 319, 99 S. Ct. at 2789, the evidence more than adequately supports the jury's finding that he knew of the Trust's illegal activities by July of 1990 and, instead of withdrawing, continued as a willing participant in return for substantial remuneration.

As the government points out, the Trust Anderskow joined in March of 1990 had a "strong aura of unreality." Government's Br. at 77. It purported to sell "self-liquidating" loans; i.e., loans that did not have to be repaid.

It also claimed to be a long-established European financial institution affiliated with the Catholic Church and the Knights of Malta, and that it had access to billions of dollars. Furthermore, loan applicants were required to sign bizarre confidentiality agreements that purported to bar customers from disclosing information about the Trust in this life *and* the hereafter. Loan applicants also were required to fill out peculiar personal questionnaires that asked if they could hold their breath under water or were flat footed, and they were asked to provide hair samples and blood tests. Given Anderskow's status as a partner in a Chicago law firm and a certified public accountant, and in light of his initial questioning of Trust brokers as to whether the money was "clean," a rational jury was entitled to find that Anderskow was suspicious from the outset. Furthermore, a rational jury could have accepted the government's argument that Anderskow's credentials provided the Trust with an appearance of legitimacy.

More significant, however, is that during 1990 no less than seventeen advance fees, which totaled $1.5 million, were deposited into Anderskow's escrow account. Despite the fact that not one loan was funded during that time, Anderskow immediately would parcel out the money to the various coconspirators. By July of 1991, moreover, seventeen additional borrowers and investors had paid Anderskow advance fees totaling $6.5 million dollars, which Anderskow disbursed to his confederates. Anderskow himself testified that during 1991 he received approximately twelve complaints *per day* from anxious loan applicants and investors inquiring about their money. Although he knew that not one loan or MCC had been funded, Anderskow continued to provide a plethora of false excuses intended to lull customers into believing that their money was forthcoming.

Even more damning was Anderskow's admission under cross-examination that by dividing up advance fees among the coconspirators, instead of retaining them in his escrow account, he knew in June of 1991 that he was violating his contractual and ethical duty to hold customers' funds until they had received their loans. The evidence showed that Anderskow also lied to one borrower in the latter part of

1991, claiming that the Trust had funded loans in the past when, in fact, Anderskow knew that no such funding had occurred. Finally, the evidence of Anderskow's financial motive and willingness to cooperate is not seriously debatable. In 1990 Anderskow earned $100,000 from the Trust, and in 1991 he received $437,000, which was more than ten times greater than his 1989 income. Anderskow mechanically complied with Voigt's directions as to how to disburse the advance fees in his escrow account among the various coconspirators.

The government presented an overwhelming circumstantial case that by July of 1991 Anderskow had willfully blinded himself to the Trust's fraudulent activities. We have held that there must be evidence establishing a "'unity of purpose,' the intent to achieve a common goal, and an agreement to work together toward that goal." *United States v. Wexler*, 838 F.2d 88, 90-91 (3d Cir. 1988). *See United States v. McGlory*, 968 F.2d 309, 321 (3d Cir. 1992), *cert. denied*, 507 U.S. 962, 113 S. Ct. 1388 (1993). We have further held that "all of the elements of the government's case, including the existence of the agreement, may be proven entirely through circumstantial evidence." *United States v. Schramm*, 75 F.3d 156, 159 (3d Cir. 1996) (citing *United States v. Kapp*, 781 F.2d 1008, 1010 (3d Cir.), *cert. denied*, 475 U.S. 1024, 106 S. Ct. 1220 (1986)). Given Anderskow's lulling of disgruntled customers, his admitted knowledge that disbursing advance fees among the coconspirators violated both the Trust's contractual obligations and his ethical duties, and his financial motive, a rational jury could have concluded beyond a reasonable doubt that Anderskow was a knowing and willing participant in a scheme to defraud by July of 1991.[7]

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7. We reject Anderskow's related assertion that fraudulent post-indictment conduct, which he claims was improperly admitted as "Evidence of [his] Prior Intent and Knowledge in Having Committed Crimes of Money Laundering," Anderskow's Br. at 36, constitutes plain error. Similarly without merit is Anderskow's assertion that the government failed to prove that his money laundering activity was intended to promote "a specific, identifiable subsequent wire fraud offense." *Id.* at 42 (citing 18 U.S.C. § 1956 (a)(1)(A)(i)). The government

B. *Anchors*

Anchors likewise contends that there is insufficient evidence of his knowing and willful participation in a scheme to defraud loan applicants. The jury acquitted Anchors of counts three through six, but found him guilty of counts seven through ten and twelve through fourteen. Accordingly, the jury found that Anchors had the requisite knowledge as of October 31, 1991, the date on which he faxed a letter on behalf of Anderskow. Again, while the government's evidence of Anchors' knowledge was entirely circumstantial, we think it provides overwhelming proof that Anchors had willfully blinded himself to the fact that he was participating in a fraudulent scheme.

Anchors joined the Trust as a "loan officer" in January of 1991, with thirty years of experience in business, the last seven of which were as a loan officer. From the moment he joined the Trust, Anchors was aware that there were loan applicants who had paid advance fees but had not received their loans. According to his own testimony, Anchors fielded "between 70 and 80" calls in January of 1991 alone from concerned customers. App. at 1203. By February, merely one month into his employment, Anchors informed Voigt that he was using "every excuse in the world," *id.* at 1205, and he raised the possibility of liabilities flowing from the Trust's failure to fund the loans. All the while, Anchors continued to provide excuses to angry customers, knowing that not a single loan had been funded. Anchors testified that by May of 1991 he was fielding approximately 250 calls per week.

Despite the fact that not one loan was funded, Anchors continued to assuage disgruntled applicants with excuse after excuse, responding to twenty calls per day from mid-

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need prove only that the activity promoted the carrying out of wire fraud generally, which it surely did here, since advance fees that had been obtained by wire fraud were divided up as compensation for the Trust members' continued efforts. Finally, we reject Anderskow's claim that a new trial is warranted because of the government's comment during summation that Anderskow withheld "presumably relevant documents," *id.* at 45; the remark was fair comment on the evidence.

July on. Furthermore, notwithstanding his attempts to downplay his significance to the Trust, Anchors clearly understood the importance of his role. For instance, he wrote Voigt that "sometimes I amaze myself with [the customers'] resultant patience," and that "I feel as though I am the [T]rust to those borrowers under my care." *Id.* at 181. More significantly, by September and October of 1991, Anchors had affirmatively lied to one customer, falsely telling him that eight other loans had been funded, which provided strong circumstantial evidence of knowledge and intent. At the same time, however, Anchors wrote to Alevy about the rising tide of customer complaints and asked for additional "creative" excuses that he could put in writing. Finally, Anchors' financial motive was beyond dispute. Although he earned $25,000 in the year prior to joining the Trust, he received $200,000 during 1991, his first year with the Trust.

We think that when viewed in the light most favorable to the government, *Jackson v. Virginia*, 443 U.S. at 319, 99 S. Ct at 2789, the circumstantial evidence of Anchors' knowledge and willful participation was overwhelming. Pointing to Alevy's testimony that they never discussed the fraud in which they were engaged, Anchors' principal contention is that, absent Alevy's allegedly improper opinion testimony, the government failed to adduce any direct evidence of his knowledge of the conspiracy's illicit purpose.[8] As we noted earlier, however, "all of the elements of the government's case," including knowledge of the conspiracy's illicit purpose, "may be proven entirely through circumstantial evidence." *Schramm*, 75 F.3d at 156 (citing *Kapp*, 781 F.2d at 1010). If Anchors' argument were taken at face value, the government could never prove the existence of a conspiracy where, as here, the coconspirators do not discuss the fraudulent nature of their actions. *United States v. Klein*, 515 F.2d 751, 754 (3d Cir. 1975) ("Circumstantial evidence is clearly proper . . . especially in a conspiracy case where direct evidence is likely to be scant.") (footnote omitted). We refuse to so hold. Ten

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8. We have already dispelled the notion that Alevy's testimony to the effect that, in *his* (Alevy's) view, Anchors "must have known" constitutes "direct" evidence of Anchors' knowledge. *See supra* n.7.

months passed during which no loan was ever funded. Given the mounting complaints and Anchors' willingness to provide both creative and false excuses for the Trust's nonperformance, which was motivated by the opportunity for substantial financial remuneration, the jury had ample evidence with which to conclude that, at a minimum, Anchors had willfully blinded himself to the fact that the Trust was a fraud and that his actions were aiding its fraudulent purpose. *See United States v. Ruuska*, 883 F.2d 262, 264 (3d Cir. 1989) (lulling defrauded victims with false excuses is circumstantial evidence of *mens rea*); *United States v. Shoup*, 608 F.2d 950, 958 (3d Cir. 1979) (anticipated remuneration circumstantial evidence of coconspirator's *mens rea*).

United States v. Klein, 515 F.2d at 751, cited by Anchors, is not to the contrary. In *Klein* we set aside a defendant's convictions for mail fraud and conspiracy to commit mail fraud, which arose out of a scheme by owners of a "debt-ridden" hotel to set their hotel afire and then collect the proceeds of several fire insurance policies. *Id.* at 752. Klein was hired to destroy the hotel for $60,000. *After* the hotel had been partially destroyed by fire, codefendant Luick was hired by another unindicted coconspirator to prepare and submit proofs of loss forms to the insurance companies. We overturned Luick's convictions because submission of the proofs of loss forms alone failed to prove that he knew of the conspiracy's unlawful purpose. Although Luick had paid Klein a referral fee, and had done so in the past, we found it significant, if not dispositive, that "[i]t was not shown that . . . Luick should have been put on notice of suspicious facts in this case because of his past dealings with Klein. In fact the nature of Klein's and Luick's past dealings was left wholly unexplained." *Id.* at 755 (footnote omitted).

Here, by contrast, the relationship among Voigt, Alevy, Anderskow and Anchors was fully explored at trial. It is true that Anchors joined a conspiracy that was already in progress. But unlike the defendant in *Klein*, Anchors engaged in numerous activities over a substantial period of time in furtherance of the conspiracy. While *Klein* stands for the unremarkable proposition that a latecomer to a

conspiracy does not automatically acquire knowledge of the conspiracy's unlawful purpose simply by taking a one-time action ostensibly in furtherance of its purpose, surely *Klein* does not preclude a conviction where, as here, the defendant provides a steady stream of false excuses in the face of mounting complaints from disgruntled customers in return for substantial remuneration. *Klein* is inapposite.[9]

V.

For the foregoing reasons the judgments of conviction and sentence will be affirmed in all respects.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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9. Anchors additionally contends that there was a fatal variance between the conspiracy alleged in the indictment—to defraud potential borrowers *and investors*—and the conspiracy proved at trial—to defraud only borrowers. Anchors claims that the marketing of MCCs involved only Voigt, Alevy and Anderskow. Although we agree with Anchors that the issue is preserved for review, we reject his claim. For even if his variance allegation were meritorious, and it is not, his acquittal on every substantive count of wire fraud pertaining to the Trust's marketing of MCCs demonstrates conclusively that he suffered no prejudice from any "spillover" evidence. Since those substantive charges could be sustained only under the coconspirator liability theory of *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180 (1946), it is clear that the jury declined to impute to him the actions of Voigt, Alevy and Anderskow in marketing MCCs. *See generally United States v. Quintero*, 38 F.3d 1317, 1337 (3d Cir. 1994) (variance must prejudice substantial rights), *cert. denied*, 115 S. Ct. 1263 (1995); *United States v. Kelly*, 892 F.2d 255, 258 (3d Cir. 1989), *cert. denied*, 497 U.S. 1006, 110 S. Ct. 3243 (1990); *United States v. Schurr*, 775 F.2d 549, 553 (1985), *aff'd on reh'g*, 794 F.2d 903 (3d Cir. 1986).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5093

UNITED STATES OF AMERICA

v.

RALPH A. ANDERSKOW,

Appellant

No. 95-5094

UNITED STATES OF AMERICA

v.

DONALD ANCHORS,

Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MC KEE, *Circuit Judges* and POLLAK*, *District Judge*

The petitions for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petitions for rehearing are denied.

By the Court,

/s/

Circuit Judge

Dated: August 13, 1996

* As to panel rehearing.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	: Case Number CR93-300
JOHN VOIGT, ET. AL.,	: 402 East State Street : Trenton, New Jersey
Defendants.	: May 13, 1994

TRANSCRIPT OF RULE 29 MOTIONS
BEFORE THE HONORABLE GARRETT E. BROWN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the United States of America:	ROBERT ERNST, Assistant United States Attorney BOHDAN VITVITSKY, Assistant United States Attorney
For John J. Voigt:	ROBERT SUSSMAN, ESQUIRE LAWRENCE LUSTBERG, ESQUIRE
For Ralph A. Anderskow:	JOSEPH HAYDEN, ESQUIRE RICHARD F.X. REGAN, ESQUIRE
For Mercedes Travis:	MICHAEL SULLIVAN, ESQUIRE
For Donald Anchors:	MICHAEL MUSTOKOFF, ESQUIRE
Audio Operator:	Bill Carothers

Proceedings recorded by electronic sound recording, transcript produced by transcription service.

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[40]

fraudulently received. That, to me, is a non sequitur under the Rules of Evidence. But in any event, I will certainly review those.

Now just to sum up where we are in the Borshalay co-conspirator finding, Typetanar, Kelly, Dunn, Cooper, no real issue that they are co-conspirators and their statements should be attributed to the defendants. As to Binny, Wedge and Michalic, I will review the record, but it seems to me that the statements are clearly admissible under one or several theories.

Now as far as Alevy goes, there was a motion to strike Alevy and DeSimone's testimony, is that right?

MR. MUSTOKOFF: Yes, Your Honor.

THE COURT: Go ahead.

MR. MUSTOKOFF: Well, very briefly, with regard to Alevy's testimony, at one point, I believe it was at 216 of the transcript of his direct, Mr. Alevy ventured an opinion that although he made false statements to Mr. Anchors, Mr. Anchors was not deceived by them because of — Mr. Anchors had been in business for 30 years, and I would submit to the Court that that's — I objected at the time, the Court overruled my objection. I would submit to the Court that that statement of opinion should have been barred under 701 and I would offer to the Court two cases.

[41]

The first is *United States versus Phillips,* that's found at 600 F.2d 535 and most specifically at Page 538; and the second case on point, I believe, is *United States versus Rea,* which is found at 958 F.2d 1206 and the pertinent pages, I believe, are at 1215, Your Honor.

THE COURT: All right, just a moment, please.

MR. MUSTOKOFF: Sure.

[PAUSE)

THE COURT: Do you have any cases that you relied on for the DeSimone argument? I'll read those at the same time.

MR. MUSTOKOFF: Your Honor, I don't.

THE COURT: All right, fine. Well, I'll read these two and take a five-minute break.

MR. MUSTOKOFF: Okay, thank you, sir. Actually, I have the cases, Your Honor, here.

MR. REGAN: Judge, we are going to join in the argument on behalf of Mr. Anderskow with respect to similar testimony offered by Alevy as against Mr. Anderskow.

THE COURT: All right, fine.

MR. ERNST: Can I read your copy, Mike? Can I read your copy?

MR. MUSTOKOFF: Yes.

THE COURT: Has everybody seen those two cases involved?

MR. ERNST: No, Your Honor.

THE COURT: All right. What do you want, five or ten minutes to read them? [42]

MR. ERNST: I'll try to read this.

THE COURT: All right, break until 10:10.

(RECESS]

THE COURT: Be seated. Mr. Mustokoff raises the interesting issue of Federal Rule of Evidence 701, which he initially raised at the time that the witness Alevy testified concerning his interactions and discussions with Defendant Anchors. Alevy testified concerning what he said to Anchors and what Anchors said to him, and also concluded that it was not his intention to deceive Anchors, but rather to deceive the ultimate borrowers and that he felt that Anchors, in fact, was not deceived by him, but rather that he sought to deceive the borrowers. Is that, in essence, the testimony?

MR. MUSTOKOFF: I think, Your Honor, just to put a finer point on it, what he said was that Anchors wasn't deceived by what he said, because of Anchor's experience.

THE COURT: I think he also said it was not his intent to deceive Anchors, but rather to deceive third parties and that he felt that his intent was abided by that Anchors was not, in fact, deceived. Is that correct?

MR. MUSTOKOFF: Yes, sir, and again, he also testified that there were not verbal communications during this period of time, but that these were faxed messages which he sent to Anchors primarily via Anderskow.

THE COURT: Did he testify whether he ever spoke personally to Anchors? [43]

MR. MUSTOKOFF: What he testified to, if I recall correctly, was on direct examination, he said that there were some conversations between he and Anchors during the period from January '91 through July of '91, which essentially were Anchors called him asking about the whereabouts of Voigt. On direct examination, he testified that there was some communications between himself and Anchors and Anderskow. On cross examination, I think I was able to establish that, in fact, he was mistaken as to any verbal communications between he and Anchors because there was no telephone records which reflected that and, in fact, all of his communications with Anchors were in fax or written communications.

THE COURT: All right. Excuse me just a moment, let me get another case that I just thought of.

[PAUSE]

THE COURT: All right, and I believe that the application of Mr. Mustokoff is joined in by counsel for another defendant, correct, Mr. Regan?

MR. REGAN: Yes, Your Honor. Just quickly, the testimony as to Anderskow was similar in that he was asked the question by Mr. Ernst, was it your intent to deceive Ralph Anderskow, no, and I believe Mr. Alevy's answer was something to the effect that he was also a daily participant in the same fraud. It is the same argument, Your Honor. [44]

THE COURT: All right. Now, of course, we must start out with Rule 701, to the extent that this is opinion testimony, which provides if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally

based on the perception of the witness; and (b) helpful to a clear understanding of the witness' testimony, or the determination of a fact in issue.

The interesting development of the lay opinion rule is set forth at Winestein at Section 701.01. It is noted that 701.02 — that Rule 701 seeks to balance the need for relevant evidence against the danger of admitting unreliable testimony, it recognizes that necessity and expedience may dictate receiving opinion evidence, but the factual account, insofar as feasible, may further the values of the adversary system in abandoning the orthodox rule of exclusion for a discretionary rule of admission, Rule 701 is in accord with the modern trend. The opinion rule today is not a rule against opinions, but a rule conditionally favoring them. Of course, as we know, there are two requirements for admission.

That the opinion or inference, one, must be rationally based on the witness' own perception; and two, must be helpful to the trier of fact. As to the first, of course, is the personal knowledge requirement and then, of course, the helpfulness requirement. [45]

Of course, it is also noted that Winestein at Page 701, 19 through 20, that Rule 701 does not limit the subject matter of lay opinion testimony, therefore, if knowledge, rational connection and helpfulness requirements are met, lay witnesses may give their opinion as to the mental state of others.

As we know, Rule 701 is a rule of discretion, but places the orthodox rule of exclusion with a rule that requires the trial judge on the basis of the posture of the particular case before him, to decide whether concreteness, abstractness or a combination of both would be the most effective in enabling the jury to ascertain the truth and reach a just result. Different judges may reach different determinations of the same situation because of diverse views on the need for concrete testimony and the desirability of allowing parties to introduce evidence in their own way.

The emphasis belongs on what the witness knows and not on how he is expressing himself. That's at Page 701, 31 through 32 of Winestein.

Now in connection with that —

MR. MUSTOKOFF: Your Honor, may I make one point on this issue?

THE COURT: You certainly may, as soon as I get done.

MR. MUSTOKOFF: Oh, I'm sorry, sir.

THE COURT: Only one of us can talk at one time, isn't that right? [46]

MR. MUSTOKOFF: Yes, sir.

THE COURT: Since you raised some issues and some cases that you cited me to, I read those cases and so in connection with them, I am trying to put the issue back into context.

MR. MUSTOKOFF: I'm sorry, sir.

THE COURT: Mr. Mustokoff relies on two cases, *United States versus Phillips,* 600 F.2d 535, which is a Fifth Circuit case from 1979, which doesn't seem to be particularly helpful. At Page 538, the Government stresses that Agent Mobley's testimony that Phillips "indicated" that he understood the meaning of disability, but this alone does not suffice. In the first place, this testimony may be inadmissible, and this was a case where the defendant was charged with receiving fraudulent intent to secure payment of social security benefits and the Government agent testified that when he interviewed the defendant, he indicated he understood the meaning of disability and the court says this testimony may be inadmissible.

Arguably, it amounted to little more than choosing up sides on an ultimate issue of fact, citing Federal Rule of Evidence 701. I guess that the agent's testimony that he indicated it, rather than he said it, was a question of opinion, but [47] whether or not it is inadmissible, it goes on to say, that the evidence was insufficient. So the court didn't really reach the issue there and I don't know that that particular case, as opposed to a number of cases where the Third Circuit has specifically dealt with 701, is helpful in our analysis.

Now the second case Mr. Mustokoff cites is *United States versus Rea,* 958 F.2d 1206, Second Circuit, 1992. Now this case has a rather lengthy factual background. It was a prosecution of two individuals and Getty Terminals Corporation of a conspiracy to defraud the United States and Federal tax evasion in connection with a scheme to evade the payment of Federal

excise taxes on the sale of gasoline and the particular testimony as to which a 701 objection was raised was testimony that one of the defendants had to know the reason for invoicing a third party corporation was to permit the evasion of taxes.

In that case, the Second Circuit went through the facts in some detail and concluded that at the time that the statement that he had to know was admitted, there was no basis to show the witness' personal knowledge, and therefore, at IL that time, it was error to admit it because there was no showing that it was rationally based on a perception of the witness. But they further noted that subsequently there was sufficient evidence in the record to show that it was, indeed, rationally [48] based upon it. The question was whether or not the helpfulness requirement was met.

There the court determined that it was not met because, in essence, the trier of fact had as much or more evidence as to the defendant's knowledge as the witness did. But further found that it was harmless error, essentially for the same reason, as well as an analysis of closing statements and jury deliberation indicating that not much attention was paid to the particular statement.

This is an interesting opinion and counsel can certainly address themselves to it, because it seems to be two flip sides of the same coin. one, it would appear that if there was the first prerequisite made, a lay opinion would be helpful to the jury if they did not have the underlying data and more, but would not be helpful if they did.

On the other hand, if they do have the information, it may well be harmless to admit it. It is interesting. There are a number of Third Circuit cases which are useful on this point. I don't need to discuss them right now, but I am sure counsel are probably aware of them. I just wanted to review basically what you gave me, Mr. Mustokoff, as well as a quick discussion of the rules.

Now your position is that Mr. Alevy's testimony is not helpful or not based upon his perception or both?

MR. MUSTOKOFF: Both, Your Honor. As to not being rational based upon perception, I would suggest to the Court [49]

that based on his own testimony, several telephone conversations with Mr. Anchors, which are —

THE COURT: As well as numerous written communications back and forth and a business relationship that goes over a substantial period when statements are repeatedly made that turn out to be false and promises of money are repeatedly received which are never given and funds continue to be taken on the same premises which have already been proven to be false, is that correct?

MR. MUSTOKOFF: I don't think so, Your Honor. If —

THE COURT: Why not?

MR. MUSTOKOFF: If one might look at the evidence in a somewhat different manner, if the Court looks at the actual communications between Anchors and Alevy, first, verbal communications are extremely limited. The actual communications between the two of them, person to person, are three or four, I believe, telephone conversations that take place during the period from January 191 through July of 191. After that point, there is no further communications, and the subject matter of those communications are Mr. Anchors solely asking where is Mr. Voigt and where is the money that is owed me.

If the Court has the opportunity.to review the actual communications between —

THE COURT: Maybe you could make it easier for me by [50] giving a citation to the particular pages and documents.

MR. MUSTOKOFF: Well —

THE COURT: I tried to review it during the break, but I can't say that I have gone over everything in the period that I had.

MR. MUSTOKOFF: Your Honor, most specifically, I would point to the Court the following, first, that none of the communications that were generated by Mr. Anchors to Mr. Alevy, to the best of my knowledge, are false on their face. I mean by that, most of the communications are Anchors asking for information on behalf of the borrowers. On the other hand, communications from Alevy to Anchors are —

THE COURT: How about from other members of the trust to Anchors? Anchors is receiving things not only from Alevy, but from other persons, which turn out to be false over a period of time, don't they?

MR. MUSTOKOFF: Yes, Your Honor. However, in terms of –

THE COURT: And Alevy testified that he knew of a number of communications going back and forth, so does he have to base his knowledge only on the communications that he personally sent to Anchors, as opposed to those that he knew other people sent?

MR. MUSTOKOFF: Well, most respectfully, Your Honor, when we talk about the communications being false, they go [51] to statements being generated to Anchors as to when loans will be funded, as to whether or not Anchors had any way of knowing those documents to be false, at the time that they were communicated, is the ultimate question in the case.

Now Mr. – Mr. Alevy was on the inside of this scheme looking out and it is very easy for him to say that those statements were false. But to the best of my knowledge, there is no direct evidence yet elicited by the Government that Anchors knew that those statements were false, and the only evidence that – or the only basis for Mr. Alevy's opinion, as I recall his testimony, was that Mr. Anchors had been in business for 30 years and that he knew his job and I knew mine, or words to that effect.

With regard to the other communications, to the best of my recollection, there are none that show on their face any kind of acknowledgement or false state of mind on the part of Anchors. With regard to exhibits that were identified by the defendant and testified to, although not actually entered into evidence, I can recall specifically Anchors 82, which was a letter dated November 4, 1991, in which Alevy acknowledged telling Anchors that, in fact, the Strata loan had been funded and Anchors 84, which was a series of communications between Anderskow, Alevy and perhaps Anchors, but principally Anderskow and Alevy, concerning the funding of two other loans, Owens and Viking, and finally, if the Court might [52] recall, I believe there was Anchors 83, I think Your Honor,

which was Anchors' statement back to Alevy that, in fact, he had funded the offshore accounts of six different — six different borrowers and, in fact, Anchors had funded those accounts.

So that if the Court pleases, what I am suggesting to Your Honor is that on the one hand Mr. Alevy's opinion is not rationally based upon his own perception, and secondly, that any perception that Mr. Alevy might have is skewed by his own perspective of the fraud and thirdly, under those circumstances, Mr. Alevy's opinion is not particularly helpful to the jury unless it is given as an expert, which —

THE COURT: Let's look at that helpfulness aspect. That is intriguing in the *Rea* case, as opposed to some of the others that we have discussed. Assuming that the inference or conclusion that the lay witness gives is rationally based upon his or her perception, does *Rea* say that helpfulness is really a sliding scale, and while it might be helpful at one point in the case, when you see all the evidence that finally comes in, it is no longer helpful because the jury has the information that the witness had and then some?

MR. MUSTOKOFF: Your Honor, that's not clear to me, because the

THE COURT: I mean, did you find that a little bit interesting? [53]

MR. MUSTOKOFF: Yes, Your Honor, I was totally confused by the rational put forward by the court, to be perfectly honest.

THE COURT: And then on the flip side of that is well, it is no longer helpful, but it is harmless because the jury had that and more, so I read *Rea* a couple of times and I sort of wound up chasing my tail.

MR. MUSTOKOFF: Your Honor, I had the same reaction, however, I think that the —

THE COURT: That's a Texas simile, Mr. Sussman.

MR. SUSSMAN: I still like the Fifth Circuit.

MR. MUSTOKOFF: We have all been influenced by him. If the Court please, I think — if one is to get anything from the *Rea* case and its attempt at rational, I think it is that opinions as to one's state of mind in a case of this type ought to be

admitted only under the most particularized kinds of circumstances where the opinion's basis is set forth with some degree of knowledge and direct evidence.

Here, what we have, at best, is inference based upon inference and no direct — or very little direct communication between the Defendant Anchors and the person voicing the opinion.

THE COURT: All right. Now Mr. Regan, did you want to talk about Mr. Anderskow before I ask the Government to respond? [54]

MR. REGAN: Judge, I was going to more respond to the reading I take from *Rea*, because I disagree a little bit with Mr. Mustokoff. I think it is saying —

THE COURT: Well maybe you can enlighten me on that, in any event, it is the Second Circuit, not the Third, and we should probably look at our own precedent.

MR. REGAN: Right.

THE COURT: But I found it rather intriguing, I suppose.

MR. REGAN: If I could venture, they find harmless in the case there, but I think their suggestion certainly is — is that where you have a fact witness, is that he essentially should testify as to the facts and then it is for the jury to conclude or infer or to the Prosecutor to argue what to infer from those facts, and it is not for the witness then to become a —

THE COURT: But is the helpfulness determination a conditional one? Do you say yes, I think it is helpful now, but when more evidence comes in, we look at it again and say well, it is no longer helpful because the jury has more information than the particular declarant did. Then what do you do, tell the jury to disregard it?

MR. REGAN: I would think that would be the cure, Your Honor, with it and I think —

THE COURT: Do we have a sliding scale under *Rea* , and [55] I don't — and whether the Third Circuit view is — supports *Rea* as a different issue that we can visit next, but —

MR. REGAN: It is unclear to me whether *Rea* has a sliding scale, as you put it, in terms of you kind of revisit it with the universe of evidence outside of what the witness has testified to as to his knowledge, but it seems that *Rea* also kind of

kicks in under the helpfulness thing, the second prong there, like a 403 evaluation and when you get the helpfulness, well is having the witness venture an ultimate opinion as to the knowledge or state of mind of the defendant, one really helpful, and assuming it has some minimal helpfulness or can survive the first prong under 403, it really shouldn't be admitted, and I think what *Rea* is really saying there is, is that where you have this type of a situation with Alevy, the nature of his testimony, the nature of the documents and the conversations he testified to, is that it really isn't helpful to the jury to have Alevy speculating or venturing since I knew, some other defendant must have known.

THE COURT: All right.

MR. REGAN: That's really the argument for the Prosecutor in summation.

THE COURT: And I suppose that Alevy's contacts with Anderskow are somewhat similar to those with Anchors, although in somewhat more detail, so the testimony has a certain similarity? [56]

MR. REGAN: That is correct, Your Honor.

THE COURT: All right, Government.

MR. ERNST: I don't know if we necessarily need to focus on *Rea*, because I think it does provide a confusing rule for judicial decision making. I think you can also read *Rea* to say that the two prongs of the test are sort of — influence each other, where the foundation for the opinion isn't strong, its helpfulness may similarly not be so strong. I think in this case Mr. Alevy — Mr. Alevy's testimony satisfies both prongs.

First of all, he had — he was at the center of this business, a business in which Anderskow and Anchors were intimately involved. He had very frequent communications regarding the activities of Anchors and Anderskow. Some of it was direct with either of those two people, some of it was indirect. For example, I think he testified that many of — some of his understanding of what Anchors was doing on a day to day basis came from Anderskow who served as sort of an intermediary, but I think if you read both the direct and the cross examination, particularly Mr. Hayden's cross examination of Alevy, you see that he knew what Anchors and Anderskow

were doing, maybe not on a day to day basis, but on a very frequent basis and he is uniquely situated to know what was going on in this operation and he is uniquely situated to testify about the nature of the conspiracy, how it worked and in a case where the jury has heard six weeks of testimony, most of it from people outside the conspiracy, namely the victim borrowers, he is the one person who took the stand and told the jury how this conspiracy worked on a day to day basis, explained to them that people didn't — [57]

THE COURT: But what is his testimony helpful as to what the others knew? Doesn't the jury have the same information he has?

MR. ERNST: No, I don't think they do. The jury has heard from six or eight borrowers, I believe, which is really a fraction of the total scope of the conspiracy. It is a fraction of the total contacts that Anderskow and Anchors had, and again, Alevy is the one who can testify about how Anchors and how Anderskow conducted themselves, the information that they had available to them and their reactions, or most importantly, their nonreactions to that information. His testimony was, in effect, I kept passing on information to these two fellows, they received it, they passed it on and they never came and confronted me or asked me hard questions abut this information, they kept receiving it and passing on, asking for more.

So he is the person —

THE COURT: Wouldn't that be enough, does he have to give his lay conclusion as to what their knowledge was? [58]

MR. ERNST: Well, I think he does, I think the question I asked him was, did you intend to deceive these people.

THE COURT: Did you intend to deceive these two defendants? Fine.

MR. ERNST: Correct.

THE COURT: But then the second question is, do you think that you, in fact, deceived them?

MR. ERNST: Yeah, I do think it is important, because it goes to the issue of how this —

THE COURT: If he is one of the participants, if he is dealing with them, he says, I didn't intend to deceive them and

based upon my perceptions, they weren't deceived. That is 701 testimony, is that what you're saying?

MR. ERNST: I think it is important for the jury to hear that testimony, because again, he is the one witness who explained how the conspiracy was set up, the fact that people in the conspiracy didn't talk about fraud, per se, but that each of them had an implicit understanding with each other about how this conspiracy operated. It shows how the people dealt with each other and that's what this case is about.

THE COURT: All right, thanks. Before I hear the defense, I have got to get two more cases. Sorry about that. [PAUSE]

THE COURT: All right. Please respond, Mr. Mustokoff. [59]

MR. MUSTOKOFF: Yes, a few points, Your Honor. Number one, as I stand here today, it is hard for me to imagine a more inflammatory and highly prejudicial statement than the one that was made by Mr. Alevy concerning Mr. Anchors and it is especially so because of his lack of firm information upon which to base any opinion.

THE COURT: Well now, let me just take a look at that for a minute. Isn't what Alevy said, in essence, when he said I don't believe he was, in fact, deceived, isn't he saying, I am one of the people that was trying to fool people. I put out statements to fool people. I intended to fool the ultimate borrowers that Anchors was going to deal with, I did not intend to deceive Anchors and based upon my dealings with him and the others in the conspiracy, I don't believe I did deceive him. How is — how is that not within the purview of 701?

MR. MUSTOKOFF: Your Honor, I think you have to take a look at Alevy's testimony as a whole. Now this is the guy that we just argued about in his designation of Wedge as a mark and he testified that he told Anchors essentially the same thing as he told the borrowers and the information that he conveyed to Anchors was essentially the same information which he knew that Anchors was going to then convey to the borrowers. He could not distinguish in any way that informa- [60]
tion. Moreover, if the Court, in its review of the testimony, looks at some of the communications from Mr. Anchors to Mr. Alevy in December, he is asking for realistic information and

on those — under those circumstances, for Mr. Alevy to venture an opinion to this jury, which has heard more information in terms of Anchors' statements to the borrowers, then he ever had knowledge of, is just unhealthy and highly confusing and because it goes to the ultimate issue of fact, highly prejudicial.

THE COURT: All right, thank you. Mr. Regan.

MR. REGAN: Judge, picking up with the question you asked Mr. Mustokoff, if, in fact, that's as far as Alevy had gone, did you intend to deceive the borrowers, yes; did you intend to deceive Mr. Anderskow, did you intend to deceive Mr. Anchors, no. I think we are okay up to that point. Because that's, in fact, Alevy offering testimony as to his own intent, what he intended to do.

THE COURT: But what about from your observations, did you, in fact, deceive him; you say that's not admissible.

MR. REGAN: Well, I think it goes beyond that. I don't even think he says, did you, in fact, deceive — well, he does kind of say it, but he says —

THE COURT: That's the same thing, was he fooled, did he believe it, did you deceive him, same issue.

MR. REGAN: He says that he — Right, he says that he [61]
— He says it even in a more inflammatory way, where I really think he goes beyond that and he is saying, did you deceive them, no. They were a daily participant in the same fraud that I was. I think he just really jumps right off the edge, so to speak, and says they had to know it because I knew. Is, you know — and what it is is saying like, they had knowledge of the fraud, their state of mind is that I knew it was a fraud from the get go, they had to know. That, I think, is the problematic part of it. Where I don't think that is helpful to the jury in any way, because I think him describing his interactions, his conversations, everything that Your Honor has laid out, that's fair game, the stuff like that, but then for him to go the ultimate step, and what I say is he really becomes up — you know, the prosecutor's proxy in a way, making argument. That, I think, is wrong. I don't think that was contemplated by 701. I don't think that was intended to be embraced within the second prong of either being helpful to an understanding of the wit-

ness' testimony or to be helpful to the trier of fact in the determination of an ultimate issue, particularly such a critical issue as to the state of mind and the knowledge of the defendant, and particularly a defendant whose defense obviously is going to be is that — they were not a willful participant in the scheme.

THE COURT: Counsel, I have thought long and hard about this issue and I have tried to do some research on it, [62] both initially when Mr. Mustokoff raised it and now, and I have come to the conclusion that Alevy's testimony does, indeed, meet both prerequisites of Rule 701, as I initially ruled, and that that was correct. It seems to me that you have got to see it in context. What Alevy is saying as a claimed participant was that these were the fraudulent statements that I made, and fraudulent acts that I did, this was who I intended to deceive, this is who I feel I did deceive, these are the people that I dealt with who I did not intend to deceive, this is — they were not deceived and this is why, based upon my perception and experience, were not deceived, and he has given underlying facts, so it is not in a vacuum, but again, it is somewhat similar to the cases in which the courts have allowed a statement as the shooting was accidental to come in, even though that is an opinion or conclusion, because it is based upon a myriad of facts and observations and as long as you can ask to the extent possible that the facts and the observations, that certainly can come in.

It strikes me that this testimony is very helpful to the jury because it is a statement from the claimed deceiver himself as to what his perceptions were of his deceit, its objects and its effect. Now obviously, the credibility of this claimed deceiver is a different matter, that is for the jury, but that's not for me [63] in a 701 determination, beyond that required by 104, and I certainly find that the preliminary finding there was made. But if you look at *Rea* , regardless of what that case may or may not stand for, you are dealing with a claimed deceiver discussing his own deceits and the targets and what he thought were the effect of them, but rather a participant saying that one had to know that the purpose that they were going to evade taxes,

this isn't he had to know that when I told him taxes were going to be paid, I was lying, that's not what the declarant there says in *Rea* .

Now a brief review of a few of the Third Circuit cases might be helpful, moving from the Second Circuit to the Third Circuit as it were. If you will give me just a minute.
[PAUSE)

THE COURT: A recent pronouncement by the Third Circuit is *Government of the Virgin Islands versus Knight,* 989 F.2d 619, 1993, and indeed, that is the case that I was referring to concerning a testimony that the firing of a gun was an accident, that's at Page 629. In that case, the Circuit agreed that the District Court committed error by excluding an eyewitness' lay opinion that the shooting was an accident, but found that this did not prejudice the defendant and was not reversible error.

After quoting Rule 701, Judge Cowen states that the requirement that a lay opinion be rationally based on the witness' perception requires that the witness have firsthand [64]
knowledge of the factual predicates that form the basis of the opinion, Rule 701(a), Advisory Committee note, the District Court properly excluded the investigating police officer's opinion because he did not observe the assault. In the contrast, the eyewitness obviously had firsthand knowledge of the facts from which his opinion was formed.

Having met the firsthand knowledge requirement of 701, the eyewitness' opinion was admissible if it would help the jury resolve a disputed fact. The modern trend favors admissibility of opinion testimony, the relaxation of the standards governing the admissibility of opinion testimony relies on cross examination to reveal any weaknesses in the witness' conclusion. If circumstances can be presented with greater clarity by stating an opinion, then that opinion is helpful to the trier of fact. Allowing witnesses to state their opinions instead of describing all of their observations is a further benefit of leaving the witness free to speak in ordinary language and there, Judge Cowen says, in this case, an eyewitness testimony that Knight fired the gun accidentally would be helpful to the jury.

The eyewitness has described the circumstance that led to his opinion is difficult, however, to articulate all the factors that lead one to conclude that a person did not intend to fire a gun. Therefore the witness' opinion that the gunshot was [65]
accidental would have permitted, him to relate the fact with greater clarity and hence would have aided the jury based on an assessment of the witness' credibility, the jury could attach an appropriate weight to this lay opinion.

Now I find that very helpful and useful recent guidance from the Circuit. Other cases that are of some assistance, the case of *Bushman versus Helm,* dealing with a civil case where a plaintiff sought to testify concerning a connection — actually, it was an affidavit concerning a — a connection between an alleged injury or condition and a motor vehicle accident. The Court there stated at Page 660 of *Bushman versus Helm,* 798 F.2d 651, Third Circuit, 1986, the affidavit was admissible under Rule 701 in opposition of a summary judgment motion, since it is based on firsthand knowledge and observation and it is helpful to a determination of a material issue. That is, the element of causation.

Two other cases which probably are a bit more remote are *United States versus Topary,* 778 F.2d 963, Third Circuit, 1985 and I suppose the flip side of the same issue, *United States versus Dicker,* 853 F.2d 1103, Third Circuit, 1988. In *Topary* the Court of Appeals allowed a lay witness to testify concerning his understanding of a tape recording conversation between him and another person. I believe that was an agent testifying, but in any event, they note that the language on the tape is sharp and abbreviated, composed of unfinished sentences and punctuated with ambiguous references to events [66]
that are clear only to Martin and his audience, and they said that to explain that opinion could be used to the contrary in *Dicker.* The Court of Appeals reversed in 853 F.2d 1103, Third Circuit, 1988, because the agent there was asked to interpret relatively clear statements and as such, it was not helpful to the jury.

I would reiterate my prior ruling for the reasons stated before.

Now, you had a second issue, Mr. Mustokoff, going to Agent DeSimone's testimony, am I correct?

MR. MUSTOKOFF: Yes, sir.

THE COURT: Why don't you tell me about that?

MR. MUSTOKOFF: There were three charts that were admitted through the testimony of Agent DeSimone, which I would question, Your Honor. They would be Government Exhibit 9005, entitled Disbursement of the CBIS Advance Fee.

THE COURT: All right.

MR. MUSTOKOFF: 9006 which was entitled Disbursement of the Nana's Treasures Advance Fee; and 9009.

THE COURT: All right.

MR. MUSTOKOFF: That was entitled Ralph Anderskow, Continental Bank, Clients Escrow Account.

THE COURT: All right.

MR. MUSTOKOFF: If we start with 9005, that chart suggest with regard to that transaction, there is no evidence at all [180]
against Mr. Anchors.

THE COURT: All right, thank you. Now as to Count 5, let me just look at Count 5, that's a new issue that you have just raised. Count 5 charges a wire fraud on October 2, 1991, concerning CBIS from Mr. Anderskow and charged as defendants are Voigt, Anderskow and Anchors. What is the basis for charging Mr. Anchors in that?

MR. VITVITSKY: *Pinkerton,* Your Honor. I mean, the — Mr. Mustokoff's argument, if I understand it, seems to be some kind of combination of ignoring *Pinkerton* and resuscitating *Kodiacus* and suggesting that somehow there were two conspiracies.

THE COURT: All right. So your reliance is exclusively on *Pinkerton* for that, correct?

MR. VITVITSKY: Yes, Your Honor.

THE COURT: All right.

MR. VITVITSKY: And the proposition that there was one conspiracy rather than multiple conspiracies.

THE COURT: All right. I understand your position. on that basis, the motion will be denied. As to the other aspects,

I think that there is a viable jury issue here, I will deny your motion, but I will certainly expect that you will raise it again at the close of all evidence.

MR. MUSTOKOFF: Very well, Your Honor.

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Docket No. 95-5092, 95-5093 and 95-5094

UNITED STATES OF AMERICA,

v.

JOHN J. VOIGT,
RALPH A. ANDERSKOW and
DONALD ANCHORS,

Appellants

On Appeal From Final Judgments of Conviction in the United States District Court for the District of New Jersey. Sat Below: Honorable Garrett E. Brown, Jr., U.S.D.J., and a Jury.

BRIEF OF APPELLEE

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B. Anchors

Alevy testified that during the Fall of 1991, he responded to queries from Anchors, often communicated through Anderskow. (RA1802-03) Anchors wanted to know (i) where money was that had been promised to him and (ii) the funding schedule for Trust loans. (RA1803) In response, Alevy would provide false information. (RA1803) Alevy also falsely told Anchors that certain projects had been approved and were moving forward. (RA1804) When asked, however, whether he had intended to deceive Anchors by providing him with untruthful information, Alevy answered "No, sir." (RA1804) And when asked to explain why, Alevy simply stated that "I was doing my job, he was doing his job." (RA1804) At this point, the government asked Alevy whether he believed Anchors would be deceived by the information he passed along, and counsel for Anchors objected. (RA1804) The district court overruled the objection and Anchors answered, "Personally, I did not believe that." (RA1804)[18] When asked why, Alevy responded that

> Don Anchors had probably 20 to 30 borrowers, maybe more for all I know, who had been promised millions of dollars for a long time, some as long as a year. He had never seen one dime funded or loaned, and he kept on with the business at hand. I had no reason to believe that he wasn't fully aware of what was occurring, as long as he was getting paid. (RA18094)

Alevy thereafter testified that he never specifically discussed the fact that the Trust was a fraud with Anchors (RA1804-05; 1947-48) and succinctly explained that "[t]here was no reason to discuss it, we were doing it." (RA1805; *see* RA1949)

Surely the district court did not abuse its "broad discretion" to admit Anchors' testimony. *Lightning Lube,* 4 F.3d at 1176. First, Alevy's testimony was based on firsthand knowledge gleaned from a series of telephone calls and facsimile

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18. Anchors also renewed his objection, to no avail, as part of his Rule 29 motion made at the close of the government's case-in-chief (DA578-83) and again posttrial. (V1188-93)

transmissions between Alevy and Anchors (RA1801-02), which grew more frequent over time. (RA1802) In particular, during the Fall of 1991, the very period at issue here, Alevy and Anchors had weekly contact via facsimile transmissions and occasionally by telephone, either directly or through Anderskow. (RA1802-03) Anchors' contentions to the contrary are fallacious. Reading and listening are physical senses and obviously give rise to personal knowledge. Moreover, by participating himself in the charged conspiracy, Alevy was in a unique position to cast light on how it operated and what the various roles played by the defendants were. *See Lightning Lube* 4 F.3d at 1175; *United States v. Rivera,* 22 F.3d 430, 434 (2d Cir. 1994).

Second, Alevy's testimony was helpful to the jury in its evaluation of Anchors' mental state, the critical disputed issue in the case against Anchors. As Judge Brown ruled in denying Anchors' Rule 29 motion, Alevy's testimony was "very helpful to the jury because it is a statement from the claimed deceiver himself as to what his perceptions were of his deceit, its objects and its effect." (RA2435) And as Judge Brown ruled posttrial, *not* to permit Alevy to voice his opinion would have unfairly constrained the prosecution's presentation of its theory of the case, which was that a hallmark of the Trust conspiracy was dissemination of self-serving rhetoric designed to insulate its participants from detection. (V1189-90)[19] Indeed, at one point Alevy testified that the reason he sent Anchors false information was to give Anchors a "higher source to point to get [Anchors] off the hook locally." (RA1953) Finally, as Judge Brown noted, Anchors cross-examined Alevy for two days and thus had a full opportunity to explore Alevy's knowledge of Anchors' activities.

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19. The Second Circuit has somewhat differently suggested that where knowledge can be inferred from documentary evidence, lay opinion testimony is not "helpful" within the meaning of Rule 701(b). *Rea* 958 F.2d at 1219. But here Alevy based his opinion on more than documentary evidence and at any rate, any error was surely harmless for this very reason. *See id.* at 1219-20.